No. 82-1258

In the Supreme Court of the United States

OCTOBER TERM, 1982

BRAEMOOR ASSOCIATES, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that, as a matter of state law, a breach of fiduciary duty by one partner could be imputed to other partners in a joint venture.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-32) is reported at 686 F.2d 550; the amended opinion of the court of appeals (Pet. App. 33-45) is not yet reported. The opinion of the district court (Pet. App. 1-19) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982. A petition for rehearing was denied, and the court's opinion amended, on October 28, 1982 (Pet. App. 33). The petition for a writ of certiorari was filed on January 26, 1983. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 13 of the Illinois Uniform Partnership Act (Ill. Rev. Stat. ch. 106-1/2, (1981) provides:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of

> the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Section 12 of the Illinois Uniform Partnership Act (Ill. Rev. Stat. ch. 106-1/2 (1981) provides:

> Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

STATEMENT

1. In 1975 the Illinois Commissioner of Banks and Trust Companies took possession and control of the State Bank of Clearing in Chicago and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver (Pet. App. 2). The FDIC subsequently commenced this action in the United States District Court for the Northern District of Illinois to recover bank funds that Paul Bere,[1] the bank's president and chairman of the board, had funneled to a joint venture in which he had a financial interest.

The joint venture, petitioner Braemoor Associates ("Braemoor"), was formed in 1970 as a vehicle for real estate development (Pet. App. 38). The partners in Braemoor were Paul Bere and petitioners Hulse, Bennett, Kaye,

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[1]Paul Bere died on July 26, 1974 (Pet. App. 2); neither he nor his estate is a defendant in this case.

Jousma, and Lambert Bere (*id.* at 5).[2] Between 1970 and 1972 Paul Bere unlawfully transferred more than $800,000 from the State Bank of Clearing to Braemoor. As the court of appeals noted (*id.* at 38), those transactions were unlawful under Illinois state law because Paul Bere did not disclose his financial interest in Braemoor to the bank's board of directors.

Of that total of approximately $800,000, some $300,000 is at issue in this case.[3] These funds were diverted from the State Bank of Clearing in two transactions. While the specifics of each transaction differed, they were similar in several respects. In both instances, Braemoor faced financial obligations it lacked the cash to pay. In both instances, Paul Bere asked one Kenneth Ringbloom to make payments to Braemoor in the amounts Braemoor owed to others; both times, Ringbloom lacked funds to make the payments. Paul Bere arranged for the State Bank of Clearing in both instances to extend loans to Ringbloom; Ringbloom then forwarded the money to Braemoor, which paid its creditors. In neither instance did Paul Bere disclose to the bank's board of directors that he had an interest in Braemoor, the ultimate beneficiary of the transfers.

a. The first transaction, involving $60,000, occurred in 1971. At that time Braemoor had less than $2,000 in its bank account and owed a contractor a $60,000 installment payment on a total obligation of $230,000 (Pet. App. 7, 9, 39). To make this payment, Paul Bere asked Ringbloom to

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[2]Lambert Bere was Paul Bere's brother. He became a vice-president and director of the State Bank of Clearing after the events at issue (Pet. App. 2, 26).

[3]The remainder of the illegal transactions, nine loans to individual Braemoor partners aggregating more than $500,000, were repaid and are not the subject of these proceedings (Pet. App. 38).

forward $60,000 on account to Braemoor (*id.* at 39).[4] When Ringbloom replied that he did not have the money, Paul Bere arranged for the State Bank of Clearing to make a loan in that amount (*ibid.*). Ringbloom immediately paid Braemoor $60,000 and Braemoor met its installment payment to the contractor (*ibid.*). As in the case of earlier loans to the Braemoor partners (see note 3, *supra*), Paul Bere did not disclose his interest in Braemoor to the bank's board of directors (Pet. App. 38).[5]

b. The second transaction in issue occurred in July 1972, when Braemoor needed to make an installment payment of $240,000 to another contractor.[6] Braemoor's checking account balance at this time was less than $16,000 (Pet. App. 39; Pltff. Exh. 2). Paul Bere again arranged for funds

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[4]Ringbloom had previously entered into an oral agreement with Paul Bere for Ringbloom's company, Western Land Planning Company ("Western") to purchase land from Braemoor (Pet. App. 39). Ringbloom testified at trial that no payment dates were specified in that oral agreement (Tr. 56, 59). The district court found that Western would not have paid $60,000 to Braemoor if the bank had not made this loan (Pet. App. 9).

[5]On July 14, 1972, following an audit of the State Bank of Clearing by state and federal bank examiners, Paul Bere arranged for the Marquette National Bank to loan $800,000 to Ringbloom and his company (Western) for ten days. This loan was designed to repay the $60,000 loan that found its way to Braemoor, as well as other debts Ringbloom and Western owed to the State Bank of Clearing. In order to secure this loan, Paul Bere gave Marquette written assurance that the State Bank of Clearing would, within ten days, again loan Ringbloom the full amount needed to repay Marquette. Ten days later, the State Bank of Clearing did so; Marquette was paid and, at the time the State Bank of Clearing was closed, $780,000 was outstanding on the final loans to Ringbloom. In this proceeding, FDIC is attempting to recover the $60,000 of that amount that was received by Braemoor. Pet. App. 9-10; Tr. 65-69.

[6]The contractor, Seneca Petroleum Company, was owned by petitioner Hulse (Pet. App. 6, 12; Tr. 114).

to be paid by the State Bank of Clearing, through Ringbloom, to Braemoor, but through a more circuitous route than he used in the earlier transaction (Pet. App. 39). Using a blank note he had previously asked his brother Lambert to sign for "our personal business, family business" (Tr. 222), Paul Bere caused the State Bank of Clearing to lend $417,000 to Lambert. At Paul Bere's direction, this amount was deposited in Lambert's checking account and, several days later, was transferred out of that account (Pet. App. 39).[7] Of this total, $250,000 was deposited in a checking account maintained by Ringbloom's company; that company immediately issued a $240,000 check to Braemoor (Pet. App. 40).[8] Again, Paul Bere did not disclose his interest in these transactions to the bank's board of directors.

2. The district court found that the Braemoor partners had no actual knowledge of Paul Bere's breach of trust nor did they have sufficient facts to alert a reasonable person to inquire further (Pet. App. 16). Accordingly, the court granted petitioners' motion to dismiss the complaint at the close of respondent's presentation of evidence.

The court of appeals reversed. It held that petitioners' liability does not turn on whether they knew, or should have known, of Paul Bere's breach of trust. Under the Uniform

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[7]At the time, Lambert had no outstanding debt to Western (Pet. App. 13). When Lambert received his monthly statement, he was "stunned" (Pet. App. 40) to see this swing of $417,000, but never received an explanation from his brother. *Ibid.*; Tr. 202-206, 209, 236.

[8]Paul Bere caused these loans to be refinanced through an additional series of loans involving accounts held by his brother and by several companies owned by Ringbloom (Pet. App. 13-14). The result at the end of this trail is that the funds the FDIC seeks to recover from Braemoor remain unpaid (*id.* at 14). In 1975, several of Ringbloom's companies filed Chapter XI bankruptcy proceedings. Stip. 3, 8 ("Stip." refers to the Stipulation of Uncontested Facts, Exhibit A to the Final Pretrial Order in the district court, July 30, 1979).

Partnership Act, as adopted by Illinois, Paul Bere's illegal acts are imputed to his partners and they are "constructive trustees of that breach for the benefit of the bank and its successor in interest, the FDIC, just as Paul Bere would have been * * *" (Pet. App. 41). Moreover, under Section 13 of the Uniform Partnership Act, Ill. Rev. Stat. ch. 106-1/2 (1981), the partners are liable for actions taken by Paul Bere in the ordinary course of Braemoor's business. Pet. App. 42. "The fact that the money went from the bank to Braemoor through Ringbloom and Western, or as in the second transaction through Ringbloom, Western, and Lambert Bere, rather than directly is a detail. They were transactions, 'laundered' transactions to be sure, by which Paul [Bere] channeled the bank's money to Braemoor * * *." *Ibid.*

ARGUMENT

The court of appeals carefully considered and correctly decided the issues presented. Its decision, which is based on state law, does not conflict with any decisions of this Court or of any other court of appeals. Accordingly, the case does not warrant further review.

1. Petitioners mount a two-pronged attack on the decision below (Pet. 11-12, 15-16): first, that the court of appeals relied upon a legal theory under state law that had not been presented to the trial court; and, second, that the court misapplied state law. Neither contention warrants this Court's review.

a. The court's citation (Pet. App. 29) of Section 37 of the Illinois Banking Act, Ill. Rev. Stat. ch. 17, § 347 (1981) (requiring board of directors' approval for loans to bank officers) did not inject a new legal principle into the case. From the outset, the FDIC has based its claim on Paul Bere's breach of his fiduciary duty when he caused the State Bank of Clearing to make loans for the benefit of Braemoor

without informing the bank's board of directors of his financial interest in the venture. Petitioners have never disputed the fact that this conduct constituted a breach of that duty, and the district court expressly referred to "Paul's breach of trust" (Pet. App. 16, 17).

The FDIC's main brief in the court of appeals cited several cases in support of the principle that a bank officer breaches his fiduciary duty by making loans to ventures in which he has a personal financial interest without disclosing that interest to the board of directors. (See, *e.g.*, *Shlensky* v. *So. Parkway Bldg. Corp.*, 19 Ill. 2d 268, 166 N.E.2d 793, 799 (1960); *Karris* v. *Water Tower Trust & Savings Bank*, 72 Ill. App.3d 339, 353, 389 N.E.2d 1359, 1369 (1979); *Maryland Casualty Co.* v. *American Trust Co.*, 71 F.2d 137, 138 (5th Cir. 1934); *Tcherepnin* v. *Franz*, 316 F. Supp. 714, 720 (N.D. Ill. 1970), aff'd in part and appeal dismissed in part, 485 F.2d 1251, 1256 (7th Cir. 1973).) Petitioners did not dispute, or even discuss, any of those cases. The court of appeals merely cited the Illinois Banking Act, rather than case law, as authority for the same fiduciary duty.[9]

b. Similarly without merit is petitioners' contention (Pet. 12) that the court of appeals incorrectly applied Illinois State law. As the court of appeals found, it is well established that such non-disclosure of interest is a violation of a bank officer's duty. In similar circumstances, this Court has deferred to decisions of the courts of appeals and the district

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[9]Because the issue decided by the court of appeals had in fact been raised in the district court, the cases petitioners' cite (Pet. 15) are inapposite. In *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976), the district court had granted a motion to dismiss on the ground that the plaintiff lacked standing to sue; the court did not consider the question whether the underlying statute was valid. The court of appeals held the statute to be valid. This Court reversed because the plaintiff did not have an opportunity to present evidence essential to determine the statute's validity. Similarly, in *Journey* v. *Vitek*, 685 F.2d 239, 243 (8th Cir. 1982), an issue had not been raised in the district court.

courts applying the laws of the states within their jurisdiction. *E.g., Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976); *Butner* v. *United States*, 440 U.S. 48, 58 (1979). At all events, the state law issue presented does not warrant review by this Court.

2. Petitioners' remaining contentions relate to fact-bound issues of no general importance that do not warrant further review.

a. Petitioners are incorrect in claiming (Pet. 14) that the court of appeals "substituted its own 'off-the-wall' findings of fact" for the district court's finding that petitioners had no actual or constructive knowledge of the two loan transactions in issue. The district court made no findings whatever on the question whether petitioners could be charged under general principles of partnership law with imputed knowledge of the wrongful acts.[10] The court of appeals, therefore, did not substitute findings for those of the district court; the court of appeals simply concluded as a matter of law that Paul Bere's knowledge of his own wrongdoing was imputed to his partners under Sections 12 and 13 of the Uniform Partnership Act.

b. Petitioners contend (Pet. 6, 7, 13) that the loans in issue have been repaid. This claim is based on paragraphs 26.4 and 38.6 of the stipulations in the district court (see note 8, *supra*). Stipulation 26.4 provides that "[t]he loan ledger of the State Bank of Clearing contains an entry stating that the $60,000 loan was repaid on July 14, 1972." But this is not the entirety of the relevant stipulation; it continues, and states that "the parties do not agree as to whether this loan was in fact repaid on July 14, 1972, or was

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[10]This issue had been presented to the district court both in the Final Pretrial Order, Exh. D, paras. 14-15, and in the FDIC's Proposed Findings of Fact and Conclusions of Law in the supplemental record filed in the court of appeals on Sept. 17, 1982.

refinanced through the series of transactions set forth in * * *. This loan is the subject of this litigation."[11] There is, therefore, no need further to review the conclusion of the court of appeals with respect to this issue.

c. Petitioners argue (Pet. 12) that the court of appeals' decision disregards the district court's finding (Pet. App. 16) that " '[t]he loan transactions at issue were made for the purchase of property (by Ringbloom) rather than as a device for the purpose of financing the Braemoor partnership.' " The court of appeals, however, unlike the district court, did not comment on *Ringbloom's* reasons for obtaining the loans; rather, the Seventh Circuit properly looked at the totality of the " 'laundered' transactions * * * by which Paul [Bere] channeled the bank's money to Braemoor." Pet. App. 42. In any event, the court of appeals did not "disregard" the trial court's finding, it merely noted (*ibid.*), the finding was irrelevant to the correct legal analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

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[11]Stipulation 38.6 is to a similar effect.